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An Accuser-Obligation Approach to the Confrontation Clause

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An Accuser-Obligation Approach to the Confrontation Clause

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I. INTRODUCTION

This Essay argues that the Confrontation Clause of the Sixth Amendment ought to be re-understood as primarily an accuser's obligation rather than primarily as a defendant's right. We demand that those who would perform this potentially dangerous, morally weighty, and symbolically loaded act—the act of accusation—be willing to do so face to face. We impose this requirement not only because out-of-court accusations are unreliable, though they may often be, but also in response to a deep, if inchoate, feeling that it is somehow beneath us—inconsistent with our sense of who we want to be as a community—to allow witnesses against criminal defendants to “hide behind the shadow” when making an accusation.¹ On this interpretation, requiring confrontation is a way of reminding ourselves that we are, or least want to see ourselves as, the kind of people who decline to countenance or abet what we see as the cowardly and ignoble practice of hidden accusation. This approach, though perhaps not mandated by the text or history of the Confrontation Clause, is at least as consistent

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1. The phrase “hide behind the shadow” comes from Justice Scalia’s opinion in *Coy v. Iowa*, 487 U.S. 1012, 1017-18 (1988) (quoting remarks attributed to President Eisenhower). See *infra* note 22 and accompanying text.

with both as is the current analytical framework, which treats the right of confrontation as an appendage to the rule against hearsay.

Viewing the Confrontation Clause in this way would not require courts to make dramatic changes in the application of the clause. Most cases, in fact, would come out the same way as under regnant caselaw, with the re-interpretation simply providing a better and more coherent explanation for current doctrine. An accuser-obligation model does, however, offer several benefits. First, it frees confrontation doctrine from its dependence on the reliability-based analysis governing the hearsay rule and provides the Confrontation Clause with a separate rationale befitting its constitutional status. Hearsay analysis focuses on whether testimony is sufficiently reliable; while the Confrontation Clause, on this reading, focuses on whether it is worthy of respect. Second, by providing a coherent and appealing grounding for the confrontation requirement, an accuser-obligation approach would allow for the reasoned and principled, rather than *ad hoc*, development of the law in difficult and troubling areas, such as the proper treatment of statements against interest and the testimony of child witnesses. Finally, and at a more theoretical level, recognizing that, under some circumstances, the meaning of confrontation may be as significant as its consequences highlights the way in which important legal traditions and principles can both reflect and constitute community identity and self-perception.

II. REFOCUSING CONFRONTATION ANALYSIS

Under the Sixth Amendment, a criminal defendant has the right "to be confronted with the witnesses against him."² The confrontation right has generally been understood as a right on the part of defendants to test the accuracy of trial evidence, and has long been equated with the right to cross-examination.³ This, in turn, has caused the Confrontation Clause to be treated as strongly analogous to the rule against hearsay. The standard reading is that defendants are protected from uncross-examined testimony for the same reason courts limit the admissibility of out-of-court statements generally—reliabil-

2. The full text of the Sixth Amendment provides:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel.

U.S. CONST. amend. VI.

3. *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.").

ity. In the words of the United States Supreme Court, "the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.'"⁴ Or, more recently, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."⁵

This approach has produced a doctrine which is, to say the least, unsatisfactory, and under which the Confrontation Clause has become lost in the arcana of the rule against hearsay. The details of the current doctrine are beyond the scope of this Essay, and have been well-documented by others.⁶ For present purposes the upshot is clear enough. Whether the introduction of an out-of-court statement satisfies the requirements of the Confrontation Clause depends largely on whether the statement fits within an exception to the hearsay rule. Even where the limits of the confrontation right do not map precisely the contours of the hearsay rule, the analysis displays an extremely hearsay-like emphasis on the reliability of the statement.⁷ No one likes this state of affairs; no one thinks that it makes sense to let the tail wag the dog in this fashion. Justice Breyer, for example, concurring in *Lilly v. Virginia*, recognized that recent scholarship calls out for a re-evaluation of the hearsay-driven approach to confrontation.⁸ The doctrinal confusion, however, should not come as a surprise. As long as we assume that the Confrontation Clause serves the same purpose as the rule against hearsay, it will be difficult to avoid conflating the analyses.

Untangling the doctrines depends, therefore, on unraveling the underlying rationales. That has proven difficult. Other than protecting defendants from unreliable evidence, what ends are served by the

4. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

5. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

6. See Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763 (2000); Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998); Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149 (1995); Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992); Natalie Kijurna, Note, *Lilly v. Virginia: The Confrontation Clause and Hearsay—"Oh What a Tangled Web We Weave . . ."*, 50 DEPAUL L. REV. 1133 (2001).

7. Out-of-court statements that do fall within an exception to the hearsay rule, but not within a so-called "firmly rooted" exception, may still be admissible under the Confrontation Clause if they bear sufficient "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56 (1980).

8. *Lilly v. Virginia*, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring).

Confrontation Clause? My colleague Richard Friedman has argued that reliability is not the *raison d'être* for the clause. Instead, he claims, "[t]he confrontation right, like the oath, is one of the fundamental conditions governing the giving of testimony."⁹ He has it exactly right I think, as far as he goes, but we need to go farther. Why should we see confrontation as a "fundamental condition" other than to insure the reliability of testimony? Why, other than "to advance 'the accuracy of the truth-determining process in criminal trials,'"¹⁰ might we want to consider this requirement so important?

It seems to me that this question can best be answered through a subtle but crucial shift in the way in which we understand the right—a shift from a defendant-focused to a witness-focused view of confrontation. The Confrontation Clause should be understood not solely as a right enjoyed by criminal defendants, but also, even primarily, as an obligation imposed upon would-be witnesses. Confrontation is not only something to which we are entitled once accused; it is something we are required to do if we seek to act as accusers. From the defendant's perspective, it is not so much a right to confront witnesses, as a right to require witnesses to confront you. We have decided that if one is willing to play this central, crucial role in taking a man's liberty, one ought also to be willing to look him in the eye and literally stand behind his accusation. More to the point, and recognizing the strong sense in which rules of criminal procedure are a form not only of self-regulation but also self-definition, we have decided that we want to be the kind of people who stand face to face with those we would accuse.

Let me be clear: the Confrontation Clause *is* about making sure defendants can cross-examine state witnesses and thereby put the state's evidence to the test. Everyone from Coke to Blackstone to Wigmore to the current United States Supreme Court has recognized that a key benefit of the confrontation right is that it aids in the search for truth.¹¹ I might even go so far as to agree that the primary purpose of

9. Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1200 (2002); accord Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L. J. 1011 (1998). Friedman also made this point in an amicus brief he co-authored with Margaret Berger on behalf of the ACLU in *Lilly v. Virginia*. Motion for Leave to File Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Virginia, In Support of Petitioner, *Lilly* (No. 98-5881).

10. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)).

11. Blackstone, for example explained the confrontation right primarily in terms of truth-finding:

The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before the officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose

criminal procedure in general is or ought to be to protect the innocent and insure the accuracy of verdicts. I recognize as well that the criminal justice system might well serve other consequentialist aims besides those directly related to the case at hand and its outcomes—the deterrence of police misconduct being a primary example.¹² The question here is whether consequentialist aims provide a complete expla-

that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and counsel, propounded to the witness on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

3 WILLIAM BLACKSTONE, COMMENTARIES *373. Though even in this accuracy-based rationale, note how the phrase “ashamed to testify” hints at the ignominy of the thing.

12. With regard to the Confrontation Clause in particular, Margaret Berger has argued for a “prosecutorial restraint” model, which emphasizes the potential deterrent function of the clause, an aim closely related to, but not synonymous with the aim of preventing the introduction of false or inaccurate testimony. Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992). Similarly, Eileen Scallen has argued that deterring police misconduct should be understood as one of three “dimensions” of the Confrontation Clause. Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623 (1992); see also Randolph N. Jonokait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557 (1988); Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987). More generally, Wright and Graham recognize a range of possible purposes for the Confrontation Clause, understood as one aspect of a Sixth Amendment which as a whole serves to further various aspects of an adversarial criminal justice system:

[1] to show the accused and the public that his conviction and punishment are based on provable harm to a fellow citizen rather than the political needs of the state or the spite of a paranoid; [2] to provide the accused with a neutral tribunal to decide the case rather than one predisposed to find guilt through prior familiarity with the accuser or the evidence; [3] to show the accuser and the accused that accusations are taken seriously so they must not be made frivolously or defended against with indifference; [4] to protect the accused and the grand jurors from real or imagined abuses of grand jury secrecy; [5] to provide an incentive to prosecute crimes in the vicinage so that the accused will have a jury familiar with the social context of the accuser and the accusation; [6] to make it difficult for the state to prosecute “thought crimes” that do not harm an accuser and can only be proved by torturing the accused or her allies or by ransacking their homes for books and papers that record their thoughts.

30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 6341 (1997).

nation for every aspect of our system of criminal procedure, and of the Confrontation Clause in particular.

I think not. I think that the particular ways in which we have decided to go about protecting the innocent and seeking truth have come to play an important role in the life of the nation. I have argued elsewhere that the criminal trial jury, though primarily a truth-seeking device, and perhaps secondarily a hedge against government power, also plays a significant, if tertiary, function in helping us to define and express a sense of what it means to be a member of this polity.¹³ Here I make a similar claim regarding the Confrontation Clause.

Framed in this way, analysis of the clause raises two distinct though inter-related sorts of questions. First, what might we as a community be trying to say about ourselves by requiring prosecution witnesses to confront those they accuse? What does it mean? What vision of community identity might be constructed or reinforced through enforcement of the confrontation requirement? My answers to these questions will necessarily be partial and tentative. I cannot demonstrate conclusively the social meaning of the Confrontation Clause. Meanings do not work that way. What I can do is describe the ways in which attributing a certain meaning to a rule might have explanatory power. I can articulate a vision of community that might be expressed in this way. I can point to other aspects of American legal, political, and cultural life through which a similar vision seems to manifest itself.¹⁴ In the end, however, I cannot prove meaning, only suggest it.

In broad form, the meaning I would ascribe to the confrontation requirement is this: Americans want to think of ourselves as people who will not stab a man in the back, even—and this is key—even if we are fully convinced that he deserves to be stabbed. Americans, whose very paradigm of infamy is the sneak attack at Pearl Harbor, and whose icons are the straight-talking Abraham Lincoln and straight-shooting John Wayne, want to imagine ourselves as forthright and honorable in a way which is inconsistent with a sneaking attempt to get a fellow citizen sent to jail without ever looking him in the eye. As with any self-conception, individual or collective, this vision of (communal) self is not “true” in any simple or simply descriptive sense. It is aspirational—a notion of who we want to understand ourselves to be.

The second set of questions raised by this approach is doctrinal, and is more amenable to traditional modes of legal analysis. If requiring confrontation does have something like the meaning I suggest, what follows? What sorts of evidence would then be found to offend

13. Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381 (1999).

14. It would be helpful as well if social scientists would turn their methodological tools to unpacking the ways in which legal rules manifest community identity.

the clause? In particular, what kinds of out-of-court statements ought to be understood to offend the Confrontation Clause if admitted against a criminal defendant?

Here again I think Friedman has it right, so far as he goes. He proposes a categorical rule severed entirely from the reliability-based concerns that drive hearsay analysis. Instead, confrontation analysis on Friedman's view hinges on whether the statement in question is "testimonial," with testimoniality of a statement depending upon the knowledge or intent of the person making it.¹⁵ Having described confrontation as a "fundamental condition" for the giving of testimony, the testimonial standard follows as a matter of course, and certainly represents the correct analytical approach. The difficulty with Friedman's analysis, however, is that it lacks grounding. Why require confrontation? Nor is this lacuna merely a matter of analytical aesthetics. Without a rationale, the doctrine will continue to defy rational application. For example, Friedman calls for a categorical approach to the application of the rule, but it seems at least possible that identifying a particular set of meaning-based reasons for the rule will open up the possibility of similarly grounded exceptions. In particular, if the testimonial standard is rooted in an accuser-obligation rationale, we might want to recognize exceptions for situations under which the accuser seems not to have tried to shirk this obligation.

III. THE MEANING OF CONFRONTATION

What should we make of the broad language used by Justice Scalia writing for a majority of the Court in *Coy v. Iowa*?¹⁶ In an opinion finding it unconstitutional to allow child witnesses to testify from behind a screen, he noted that the Confrontation Clause "serves ends related both to appearances and to reality."¹⁷ He opined that "there is something deep in human nature that regards face to face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"¹⁸ In an effort to flesh out this "something," Justice Scalia ranged far afield, citing not just previous Supreme Court opinions but also *The Bible*, Shakespeare, and Dwight D. Eisenhower.¹⁹ The quoted passage from *The Bible* is from the book of Acts: "[I]t is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance

15. Friedman, *supra* note 6, at 1042 ("Under this approach, a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the prosecution or investigation of a crime.") (emphasis omitted).

16. 487 U.S. 1012 (1988).

17. *Id.* at 1017.

18. *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)).

19. *Id.* at 1015-18.

to defend himself against the charges.”²⁰ The Shakespeare quotation comes from *Richard II*: “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak”²¹ The Eisenhower citation is worth quoting in full:

In Abilene, he said, it was necessary to “[m]eet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow.”²²

It would be a mistake to make too much out of Justice Scalia’s rhetoric, given that it was hardly necessary to the decision in that case, and that the Court soon retreated from his broad reading of the confrontation right.²³ At the same time, it would be a mistake to relegate Justice Scalia’s remarks in *Coy* to the status of interesting but misguided dicta. I hesitate to speak with any confidence about what lies “deep in human nature,” but it does seem fair to say that there is something intuitively appealing, at least within the context of American legal and popular culture, about requiring face to face confrontation under many circumstances. Justice Scalia was on to something. In fact, I believe that he was on to very much the *right* something, except that he was examining it from the wrong perspective. He was emphasizing the respect owed to the rights of the accused, whereas it seems to me that our intuition rests at least as much on the *lack* of respect we have for those who would hide from those they accuse.

When chided by the dissent in *Coy* for his wide ranging set of citations, Justice Scalia responded that he intended “merely to illustrate the meaning of ‘confrontation,’ and both the antiquity and currency of the human feeling that a criminal trial is not just unless one can confront his accusers.”²⁴ Note however, that this is a very different point from that attributed to President Eisenhower. Eisenhower was not

20. Acts 25:16.

21. WILLIAM SHAKESPEARE, *RICHARD II*, act 1, sc. 1.

22. *Coy*, 487 U.S. at 1017-18 (quoting a press release of remarks given to the B’nai B’rith Anti-Defamation League, November 23, 1953, quoted in Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959)).

23. Just two years later, in *Maryland v. Craig*, 497 U.S. 836 (1990), the court held 5-4 that it did not offend the confrontation right to allow a child witness to testify via closed-circuit television. That result in and of itself could have been defended on a number of grounds, including, I would suggest, grounds quite similar to those suggested by Justice Scalia in *Coy*. The Court, however, rooted its opinion in an accuracy rationale, holding that face to face confrontation is not necessarily a requirement where the reliability of the testimony can be otherwise assured. Justice Scalia, joined by Justices Marshall, Brennan, and Stevens in dissent, did not reiterate his musings about the meaning of the confrontation right, but mounted a series of textual arguments and arguments from precedent.

24. *Coy*, 487 U.S. at 1018 n.2.

talking about the accused but about the accuser. He was not talking about the fairness of criminal trials, or even about the potential inaccuracy of a behind the back accusation, but about the ignobility of accusing in such a fashion. The very language smacks of disdain for the whispering back-stabber: "sneak up on him from behind . . . hide behind the shadow." And the consequence he highlights is not an unjustified conviction but an "outraged citizenry."

The language of the clause itself suggests a witness-centered approach. The defendant's right is not "to confront" but "to be confronted with" the witnesses against him. The witness is the one who must do the confronting—who must not "hide" or "sneak." My point is not that grammar should govern constitutional interpretation, but simply that the proposed interpretation is fully consistent with the language in which the right is grounded. Interestingly, another clause employing a similar grammatical structure is the one which directly precedes the Confrontation Clause and which provides that an accused has the right "to be informed of the nature and cause of the accusation."²⁵

This right "to be informed of the charges" seems at first blush to require no explanation. After all, what could be more central to a fair trial than that the accused know what he is accused of doing? Upon reflection, however, the very obviousness of this right is itself a source of uncertainty as to the necessity for and provenance of the Information Clause. Was it really feared that people would be tried without being informed of what they were charged with? More to the point, could there be any doubt that the right to be thus informed would constitute a fundamental aspect of the due process protected by the Fifth Amendment? Perhaps the Information Clause simply manifests an abundance of caution. On the other hand, perhaps the clause adds not to the function, but rather reinforces the meaning of that stretch of Sixth Amendment landscape. The state must inform and the witness must confront. The two together define the polar opposite of the sneak attack.

The first step in fleshing out this intuition is to acknowledge the extent to which convicting a fellow citizen of a crime is and perhaps will always remain a deeply troubling act. By troubling, I do not mean wrong, or unjustified. We must, for good and adequate reasons, be willing to punish, which means that we must be willing to judge. But if we are thoughtful people, we will never take that task lightly—never consider it unproblematic that we, who but for the grace of God might have been in the shoes of he whom we now convict, should sit in judgment.

Further, attributing the sort of meaning I have suggested to the Confrontation Clause implies recognition that witnesses for the state

25. U.S. CONST. amend. VI.

play a particular and particularly central role in the process through which we judge and punish. Formally, it is possible to view state witnesses as mere sources of information, but in fact they are more. There is a sense in which those who are willing to accuse others—those who know that they are participating in securing a conviction—are not merely assisting the state. They are in some sense invoking the assistance of the state in an effort to do this perhaps necessary but necessarily troubling thing. As one early description of the confrontation right put it, an accuser “aims a deadly dart at [one’s] life and . . . character.”²⁶ It would be disingenuous to deny that “witnessing,” at least on behalf of the state in a criminal trial, has this strongly performative aspect. It is something one does, rather than simply something one says, and not merely in the sense that “communicating information” is describable as an activity. Giving testimony against a criminal defendant (or, critically, making statements you hope will be used to that end) is not simply communication; it is accusation, conviction, the casting of a stone. And perhaps this is the sort of thing which should only be done by those who are in some sense willing to put themselves on the line.

Along these lines, the confrontation right might be best understood in conjunction with the oath requirement. The oath plays a number of roles in the trial process, including impressing upon the witness the solemnity of the occasion and reminding the witness of the penalties for perjury. It seems to me, however, that the oath also performs a subtly different function—that of requiring the witness to stand behind the account he is about to give. Think of the preacher who interrupts his own sermon to call out “Can I get a witness?” He is not searching for someone who will confirm the factual accuracy of the statement he has just made. Rather, he is asking for people to stand up and say “Amen,” to stand behind his truth as their truth, to stake themselves on the strength of his “testimony.” The oath taken by a witness in a criminal trial may similarly serve a way of requiring witnesses to put themselves on the line.

The rhetorical history of confrontation illuminates this aspect of accusation. For example, the frequently cited New Testament passage about the “way of the Romans” is not the first or only biblical reference to the obligations imposed on those who would accuse their fellows.²⁷ In the Old Testament, immediately following the passage describing

26. 1 ARTHUR BROWNE, *A COMPENDIOUS VIEW OF THE CIVIL LAW AND THE LAW OF ADMIRALTY* 43-44 (2d ed. 1802) (stating that “in criminal prosecutions nothing can compensate the accused for the refusal of liberty to meet the adversary face to face, and to confront the man who aims a deadly dart at his life and at his character . . .”), *quoted in* 30 WRIGHT & GRAHAM, *supra* note 12.

27. *Acts* 25:16 (“It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges.”), *quoted in* *Coy*, 487 U.S. at 1015-16.

the two witness rule for capital cases,²⁸ the following procedure is mandated: "The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people. So thou shalt put the evil away from among you."²⁹ What does it mean to require that "[t]he hands of the witnesses shall be first upon him"? It means, among other things, that those who would accuse must come to the front, rather than accuse from within or hidden by the mob. Those who would perform this act of exclusion from the community and point to another as no longer worthy of membership (or in the case of the Old Testament's death penalty, life itself) must show themselves as willing to stake their own reputation on the charge. This is reflected as well in the explicit requirement that testimony be given in front of the accused.³⁰

The same sentiment resonates in the oft-quoted admonition regarding casting the first stone.³¹ Recall that in the biblical source there is no doubt whatsoever about the guilt of the accused, a woman charged with committing adultery, and no doubt in the relevant context about the seriousness of the crime. Nor can the point be that only the sinless are competent to accuse. In the context of the New Testament, that would in effect preclude all punishment of crime. Instead, the requirement is that whoever would accuse must not "hide in the shadow," but should put themselves forward, come to the front, show themselves as ready to stand behind the accusation.

It is not my purpose here to rehearse the long history of the confrontation right,³² but merely to suggest that key aspects of that history are consistent with a view of confrontation as not just a witness'

28. "At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death." *Deuteronomy* 17:6.

29. *Deuteronomy* 17:7.

30. *Deuteronomy* 19:16-18.

31. *John* 8:4-11:

They say unto him, Master, this woman was taken into adultery, in the very act. Now Moses in the law commanded us, that such should be stoned: but what sayest thou? This they said, tempting him. But Jesus stooped down, and with *his* finger wrote on the ground, *as though he heard them not*. So when they continued asking him, he lifted up himself, and said unto them, He that is without sin among you, let him cast the first stone. And again he stooped down, and wrote on the ground. And they which heard *it*, being convicted by *their own* conscience, went out one by one, beginning at the eldest, *even* unto the last: and Jesus was left alone, and the woman standing in the midst. When Jesus had lifted up himself, and saw none, but the woman, he said unto her, "Woman, where are thine accusers? Hath no man condemned thee?" She said, "No man, Lord." And Jesus said unto her, "Neither do I condemn thee: go, and sin no more."

32. For different views of that history, see Friedman & McCormack, *supra* note 9; Frank R. Herrmann, S.J. & Brownslow M. Speer, *Facing the Accuser: Ancient and Medieval Precursors of the Confrontation Clause*, 34 VA. J. INT'L L. 481

right but an accuser's obligation. Ultimately, my claim is more presentist than historical—a set of suggestions about what the confrontation right might mean to us. Indeed, given that the Framers left us little or no direct indication of what the confrontation right meant to them,³³ even the most thorough-going originalist would have to acknowledge the necessity for us to craft our own understandings. I highlight some of the rhetoric surrounding the evolution of the right only to show that an accuser-focused approach to confrontation would not represent a complete departure from past understandings of the right.

In this vein, and leaping forward into the Anglo-American origins of the confrontation right, consider Lilburne's framing of the demand for confrontation:

Hold a while, hold a while, let there be no discourse but openly, for my adversaries or prosecutors whispering with the Judges is contrary to the law of England, and extremely foul and dishonest play . . . I tell you Sir, it is unjust, and not warrantable by law, for him to talk with the court, or any of the Judges thereof, in my absence, or in hugger-mugger or by private whisperings.³⁴

The accuracy rationale is certainly here, even central, but so too is a witness-centered rhetoric of honor. Note the repeated use of the term "whispering," and the way in which the phrase "hugger-mugger" seems to suggest something beneath the dignity of those we respect. And there is nothing subtle at all about the central characterization of behind the back testimony as not just dishonest, but "foul and dishonest." A similar connotation emerges from John Adams' description of interrogatories, understood as substitutes for live testimony. In comments made in conjunction with the defense of John Hancock in 1768, Adams notes that "[e]xaminations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them."³⁵

Look again at the text of the Confrontation Clause, and in particular to the term "confrontation" itself. As Justice Scalia repeatedly emphasized in his dissent in *Maryland v. Craig*, the primary and most straightforward meaning of the word "confront" in ordinary usage is one of face to face meeting. But it is equally clear that something

(1994); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77 (1995); and Pollitt, *supra* note 22.

33. As Justice Harlan famously observed, "[T]he Confrontation Clause comes to us on faded parchment." *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) (finding no convincing historical evidence of the intended meaning of the Confrontation Clause).

34. Harold W. Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213, 233-34 (1952).

35. 2 LEGAL PAPERS OF JOHN ADAMS 207 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (1768), *quoted in* Berger, *supra* note 12, at 579 n.94.

more must be meant by the term in this context—something if not different, at least more complicated. No one would be satisfied with an empty formality where, for example, a witness and a defendant might be required to simply stare at each other for a few minutes prior to trial, “frowning brow to brow,” before the witness is dismissed and his testimony provided to the jury in the form of an affidavit. From the defendant’s perspective, the term confrontation is thought, quite sensibly, to include some notion of cross-examination. But what about from a witness-centered perspective? Here, another meaning of confrontation emerges—one which implies not just “facing” but “facing up to.”

When someone has a problem and we say that he or she needs to “confront” that problem, we mean not only that he or she must look at it, but that he or she must acknowledge it. To confront a problem in this sense means to admit its significance, internalize it, deal with it. This acknowledgement, it seems to me, is a big part of what we want people to do if and when they decide to sit in judgment—to aid in the conviction of a fellow citizen. I have argued elsewhere that the criminal trial jury can be understood in part as an institution through which each of us in turn are forced to face, to confront, the difficult and troubling thing we do when we judge another. Here my point is that we might expect that those who would ask us to take that step—who would claim to provide the grounds for our judgment—should be willing to do the same. If you are prepared to say that we should perform this act of judgment and exclusion, do not stand in the shadow and pretend to wash your hands of what, on the strength of your words, you are about to do. To the contrary, you must be willing to dirty your hands, as it were, by being the first to lay them on the one you would have us convict. Cast the first stone.

The vision of confrontation, and of community, offered here might at first blush seem all together too elitist, too aristocratic, to play a role in the American self-conception. All this talk of “[l]ook me in the eye,”³⁶ and the like, seems to paint criminal procedure as some sort of substitute for dueling. Doesn’t this emphasis on the honor or dignity of the process rather than the efficacy sound like some remnant of the American ante-bellum south? Might it not seem at best as something of an aristocratic indulgence? At a deeper level, however, allowing the language of honor to pervade criminal procedure more generally might better be understood as manifesting a deeply democratic sentiment. It announces a commitment to a certain kind of equality, and gives it substance. If one views criminal procedure as merely an administrative function, akin perhaps to pest control, it would indeed seem silly to invest it with any deep meaning. It is our respect for—

36. *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

and presumed equality with—those we would convict that makes the way in which we go about convicting them potentially so meaningful. No society required a gentleman to duel with his valet; him one could simply cuff behind the ears. In the American south, no slave owner would have thought of fighting a duel with a slave; him one could simply whip. Adopting this theme in a modern, egalitarian context, requiring confrontation might be understood as a way of saying that we have no valets here, and no slaves. All we have here are the kind of people who deserve to be looked in the eye.

I am not making the claim that the American people, or even the American criminal justice system, is characterized through and through by the type of egalitarian forthrightness described here. I am not even sure how one would measure that sort of thing. Certainly, it would have to be admitted that the criminal justice system requires us to do many things of which we can not be proud, including things which fly in the face of the “look him in the eye” ethic described here. We encourage co-conspirators to betray one another. We literally pit brother against brother. We employ undercover officers to lie and gain people’s trust so that they can betray them. This is unpleasant stuff, however necessary and justified, and the names we give to those we employ in this dirty business—“rat” and “narc”—evinced our desire to distance ourselves from what we do. But none of this takes away from my claim. Granted, we often behave shamefully, and we know it. This is all the more reason why, *if* we want to understand ourselves as something other than shameful—if we aspire to a particular vision of nobility—we need to find ways of announcing and embodying the identity we would claim for ourselves.

Granted that we are not yet what we ought to be, or what we wish we were, what follows? It would be a problem if we were for strategic purposes to try and portray ourselves to others as noble in this way or that, while ourselves not actually aspiring to that nobility. It would also be a problem if we were to lie to ourselves systematically in an effort to justify complacency. But it is manifestly not problematic to act as nobly as we are able, in the belief that those occasions of honorable behavior, however rare, say something important about who we really are. That is not hypocrisy but hope.

IV. A WITNESS-FOCUSED DOCTRINE

If confrontation has something like the meaning I have suggested, it would make sense to embrace the standard advocated by Friedman: If a statement is made or elicited with knowledge that it might be used to convict someone, then the person who makes the statement is acting as a witness and ought to be required to confront the person he would accuse. The key question, on this reading, is whether the state-

ment in question should be considered "testimonial."³⁷ In the language of the Confrontation Clause itself, hearsay declarants would not be considered "witnesses against him" absent the requisite awareness. Friedman has examined the Confrontation Clause with an eye to reconciling text and history under the rubric of a coherent doctrine. It is to me reassuring that looking at the clause from the perspective of the witness, and with an emphasis on its meaning as well as its function, suggests a result very much in line with his.

A testimonial standard might be both more permissive and more restrictive than the hearsay-bound analysis currently employed.³⁸ It would be more permissive in the sense that many out-of-court statements would not be seen as offending the clause. Even where a statement is being offered for its truth, and thus subject to scrutiny under the hearsay rule, it would not give rise to Confrontation Clause problems unless made or elicited with an awareness that it would be used by the state in a criminal case. For example, co-conspirator statements admitted under Federal Rule of Evidence 801(d)(2)(D) would not be subject to scrutiny under the clause. If such statements meet the requirements of the rule, and in particular the requirement that they were made such in furtherance of the conspiracy, it seems clear that they would not have been made with the knowledge or intent that they be used against a criminal defendant. On the other hand, the standard outlined here would be more restrictive in the sense that the applicability of a hearsay exception, however firmly rooted, would not in and of itself overcome a Confrontation Clause objection. Nor would a showing of trustworthiness, as a witness-centered approach to confrontation might call for the exclusion of a particular statement even if it is considered completely reliable.

Friedman advocates a categorical rule of exclusion for statements deemed testimonial.³⁹ It seems, however, that the grounding of the testimonial standard in witness-centered rationale may have implications for the application of the standard that are not perfectly in accord with those suggested by Friedman. In particular, a focus on the meaning of the clause might suggest a less categorical approach to the rule.

To get a sense of the way in which an accuser-obligation approach to the Confrontation Clause might function, consider two easy cases. First, a person who believes his neighbor is selling illegal drugs calls the police to report her, but then flees the jurisdiction to avoid having to confront her in court. He knew and in fact intended that his statement would be used against a defendant. Note that it should not be

37. Friedman, *supra* note 6.

38. *Coy*, 487 U.S. at 1013 ("One might say that the confrontation right is far less extensive, but far more intensive, than the rule against hearsay.").

39. Friedman, *supra* note 6.

necessary for him to have anticipated a trial, *per se*. Perhaps he hoped or expected that she would somehow be punished without a trial. Perhaps he gave no thought to the particular procedural consequences, but just wanted to run her out of the neighborhood one way or another. What should matter is simply that his behavior is describable as an accusation—that he knew or intended to get her in some sort of official trouble. If so, he would not be entitled to be heard in this way, at least in a criminal proceeding, and an attempt by the state to introduce a description or transcript of his statements would give rise to a valid objection under the Confrontation Clause. By way of contrast, other sorts of out-of-court statements would not present any difficulty under the clause. For example, a UPS driver's regular report, in which as a part of his daily routine he describes the number and sort of packages delivered to the various addresses on his route, including defendant's home, might be pulled from the company, filed and introduced in court as part of the state's case. That report would be unobjectionable under a witness-centered approach.

These examples are both easy cases for two reasons. First, they are easy because there is little ambiguity about whether the person making the statement knew it would be used against a criminal defendant in some way. The tattletale neighbor did; the UPS driver did not. The cases are easy for another reason as well. They produce outcomes completely consistent with current doctrine. Again, current Confrontation Clause analysis of out-of-court statements depends heavily on the hearsay clause, under which both statements—that of the tattletale neighbor and that of the UPS driver—would be inadmissible absent some exception. But the exceptions bring the results in line with what we would find under the witness-centered approach. The neighbor's statement would not fit within any recognized exception to the hearsay rule and therefore, with the tail wagging the dog as it does, would also be found to offend the Confrontation Clause. The UPS driver's statement, on the other hand, would fit squarely within the "firmly rooted" business records exception, and would thus survive scrutiny under either a hearsay-based or witness-focused approach to the Confrontation Clause.⁴⁰ Obviously, not every case will fall in line so easily. We should hardly expect to move an important constitutional provision onto a new conceptual foundation without seeing at least some doctrinal consequences.

That said, a testimonial standard fleshed out in the way I suggest would result in many cases being decided the same way as they are under current doctrine. This result is neither coincidental nor irrelevant. The accuser-obligation model looks for, and attempts to guard against, circumstances where a witness seems to be behaving dishon-

40. FED. R. EVID. 803(6).

orably by refusing to stand behind an accusation. It is fully consistent with human nature that those will be the same circumstances under which we may have the least faith in the reliability of those accusations. This does not mean that the reliability- and meaning-based rationales are the same. It simply means that one of the main reasons a person might refuse to stand behind an accusation is that he or she knows it is not true. What I propose, therefore, though at some level a 180° shift in perspective, is in a sense not radical at all. As I see it, the goal ought to be to put the confrontation doctrine on new and firmer footing, but in a way that does not call for an impracticable wholesale abandonment or reversal of current law.

A. The Unavailability Requirement

A central doctrinal question is whether the unavailability of the witness/declarant should matter in determining the admissibility of an out-of-court statement under the Confrontation Clause. In line with current doctrine, a present willingness and availability to testify would cleanse the confrontation taint of prior statements.⁴¹ Since my approach focuses on the behavior of the witness rather than on the nature or reliability of the statement itself, the requirement should be considered satisfied where the witness does come and confront the defendant, even if prior statements are also admitted, and even if those prior statements were testimonial. Put differently, the confrontation requirement applies to accusers, rather than to statements. Of course, there still might be hearsay problems with prior statements, many of which would be inadmissible despite the witness's availability.

Granted that live testimony by a witness satisfies his or her obligation to confront, should an inability to give live testimony open the door to prior accusations? As a first approximation, the answer is no. If a statement was not made with the requisite awareness or intent, its introduction would be unobjectionable under the Confrontation Clause even without a showing of unavailability. If, on the other hand, a statement was made with knowledge that it would be used against a criminal defendant, the unavailability of the person who made the statement would not automatically render its use at trial unproblematic. Thus far, my approach is fully in line with that advocated by Friedman, and can be understood merely as providing a possible rationale for his suggested testimonial standard. But a closer look at the implications of that rationale may point in the direction of a somewhat more flexible analysis.

If we adopt a witness-centered or testimonial approach to the Confrontation Clause out of an unwillingness to abet the ignoble act of

41. *California v. Green*, 399 U.S. 149 (1970).

sneaking accusation, rather than merely out of a desire for a more coherent doctrine, or out of formal fidelity to a particular sense of the term "witness," we ought to consider whether the unavailability of some witness might not be seen as cleansing or mitigating the ignobility we hope to eschew. If our reason for requiring confrontation is meaning-based rather than merely formal or solely consequentialist, we need to acknowledge that the unavailability of a witness might, under some circumstances at least, alter our perception of what it means to make use of a prior out-of-court statement.

If so—if the unavailability of a witness is to matter—it would need to be defined somewhat differently from the way it is defined under the hearsay rule. In particular, a self-imposed "unavailability" would hardly make us more willing to admit the statement. The witness who asserts a claim of privilege or flees the jurisdiction would be considered unavailable under the hearsay rule;⁴² however, such a witness would present the paradigm case of testimony offensive to a witness-centered view of the Confrontation Clause. Instead of "unavailability," therefore, we might suggest that the "inability" of a witness to testify at trial would make us more willing to admit his or her prior statements over a Confrontation Clause objection. If, for example, a witness has died, or is too ill to testify, there is much less reason to perceive a refusal to do so as an ignoble attempt to accuse without standing behind the accusation. The inability of a witness to testify would not operate as a blanket exception to the confrontation requirement. The point is simply that a witness-focused view leaves room for exceptions, and that one of the requirements—perhaps necessary but not sufficient—for recognizing an exception might be the inability of a witness to testify at trial.

This result would require a re-examination of current caselaw on unavailability. In *Barber v. Page*,⁴³ the Supreme Court held that a state prosecutor making use of prior testimony by a witness without at least attempting to produce that witness at trial violated the Confrontation Clause. The implication was that in the case of prior statements offered against criminal defendants, unavailability has a more stringent constitutional dimension, such that satisfying the requirements of the hearsay rule does not necessarily satisfy the Confrontation Clause. This principle was reinforced, though hardly clarified, in *Ohio v. Roberts*,⁴⁴ where the Court suggested that a showing of unavailability might be a prerequisite under the Confrontation Clause even for statements introduced under hearsay exceptions that do not themselves require such a showing. In *United States v. Inadi*,⁴⁵ how-

42. FED. R. EVID. 804(a).

43. 390 U.S. 719 (1968).

44. 448 U.S. 56 (1980).

45. 475 U.S. 387 (1986).

ever, the Court held that it was appropriate to admit, under the co-conspirator exception to the hearsay rule, the prior statements of a prosecution witness who had claimed car trouble and failed to appear at trial. While the precise contours of *Inadi* and subsequent caselaw remain blurred, it is clear that under current doctrine unavailability is *not* a blanket requirement for the admissibility of prior statements under the Confrontation Clause.⁴⁶

By contrast, an accuser-obligation model would, as noted, require that unavailability be a requirement for the introduction of prior statements against criminal defendants, at least so far as those statements are considered testimonial. Moreover, an accuser-obligation model might call for a particularly stringent unavailability standard, under which the voluntary absence of the witness does not suffice. Note, however, that despite the apparently radical shift in focus, many cases would come out the same way as under current doctrine, albeit under a different rationale. Again, the correspondence is not accidental. By restricting the application of the Confrontation Clause to statements that are testimonial we avoid having to create *ad hoc exceptions* for statements we later want to admit. Put differently, most of the out-of-court statements we would want to admit against a criminal defendant despite the availability of the declarant will be those which are not testimonial in nature.

In the *Inadi* case, for example, an accuser-obligation model would reach the same result the Court came to under current doctrine, despite the apparently fundamental disagreement on the issue of unavailability. Again, co-conspirator statements, because they were by definition not made with the knowledge or intent that they would be used against a criminal defendant, would not be considered testimonial, and would not be covered by the Confrontation Clause at all. Any objections would have to be based on the hearsay rule which, as the court in *Inadi* correctly observed, does not require a showing of unavailability.⁴⁷ This is just one example of the way in which shifting to an accuser-obligation model would allow us to clarify and re-ground confrontation analysis without forcing a reversal of key cases.

Some might argue that a showing of unavailability alone should be enough to permit the admission of out-of-court statements under the Confrontation Clause. This would be consistent with a view of the

46. See, e.g., *White v. Illinois*, 502 U.S. 346, 354 (1992) (regarding the former statements of a four-year-old girl who had been the victim of sexual assault, the court stated that *Ohio v. Roberts* "stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding . . ."). As described below, cases involving the testimony of very young child victims present difficulties under any approach to the Confrontation Clause.

47. *Inadi*, 475 U.S. 387.

confrontation right as essentially embodying a rule of preference for live testimony. Such an interpretation, however, would be problematic not only because it would represent a radical departure from current caselaw, but also because it would not align with our witness-focused rationale. If, for example, a person were to make an accusation and then flee the jurisdiction in order to avoid having to confront the accused, we would want to exclude those statements under an accuser-obligation model of the Confrontation Clause. Now, suppose the accuser happens to die prior to trial. Should the fact that he is now truly unavailable serve to cleanse the ignobility of his accusation, given that he would not have been willing to testify in any event? I would think not. Accordingly, an accuser-obligation model would look more closely at the circumstances under which an accusation was made, and would view unavailability as a necessary but not sufficient condition for the admissibility of an out-of-court statement under the Confrontation Clause.

B. Dying Declarations

Once unavailability is demonstrated, one exception might be for that class of statements known as “dying declarations.” More than a century ago, in *Mattox v. United States*, the Court observed that such statements were never treated as even potentially troubling under the Confrontation Clause.⁴⁸ The same observation would hold true today.⁴⁹ On the standard model, this lack of concern would have to be defended on reliability grounds similar to those which have traditionally been used to justify the analogous hearsay exception. This result is problematic to say the least. Do we really believe that people will “refuse to meet their maker with a lie on their lips”? Perhaps there is some ongoing validity to the religious-based reliability reasoning behind the exception, especially as limited to statements “concerning the cause or circumstances of what the declarant believed to be impending death.”⁵⁰ But do we really want the status under the Confrontation Clause of these statements to hinge on our faith in this dubious reliability-based rationale?

A witness-centered perspective suggests a very different approach. The focus would not be on the extent to which such statements—statements made with what one believes to be one’s last breath—are presumed to be reliable, but on the extent to which such statements are judged to be worthy of respect. Do we feel that those who speak in this way under these circumstances are entitled to be heard? A formalist application of the standard described above might seem to argue for

48. 156 U.S. 237 (1895).

49. See, e.g., *Lilly v. Virginia*, 527 US 116, 125 (1999).

50. FED. R. EVID. 804(b)(2).

exclusion. After all, one who makes a dying declaration may well know—know and hope—that his or her statements will be used to convict their killer. In this sense, dying declarations are most emphatically “testimonial.” A deeper look at the rationale for adopting that or a similar standard, however, may cut the other way.

Under most circumstances, we may think that a person who would attempt to convict another without confronting him has behaved ignobly and is not entitled to the respect of having that statement heard in court. But the situation of the dying declarant may well resonate differently. First of all, there is no reason to believe that he or she would have been unwilling to meet the defendant in court. But that proves too much, as it might also be true of any witness who is unavailable, at least so far as the unavailability is not self-imposed. The deeper point may be an affirmative one—a sense that a person who decides to use his or her last moments to make a statement of this sort—to give this sort of “testimony”—is very much entitled to be heard. In this sense a dying declaration has the character not merely of testimony but as well of a final request. A willingness to use one’s final words in this way operates as a request—a request to be heard. We might well consider ourselves churlish to refuse a dying man so modest a favor. Instead, we might charitably prefer to observe that there is no reason to believe that the victim was trying to avoid the confrontation obligation, and in that light find the unavailability of death sufficient.⁵¹

C. Declarations Against Interest

What about statements like those at issue in *Lilly v. Virginia*⁵²—statements analyzed under the hearsay rule as “declarations against interest”?⁵³ In that case, Mark Lilly, Benjamin Lilly, and one other man went on a crime spree culminating in a fatal shooting. Mark Lilly made statements to the police in which he admitted to several crimes, but claimed that it was his brother Benjamin who had actually done the shooting. At Benjamin’s trial, Mark refused to testify, claiming the privilege against self-incrimination. Under current doctrine, the admissibility of Mark’s statement hinged on its status under the rule against hearsay, or, to be precise, on the status of the exception to the hearsay rule under which the statement might be admissible. A divided court first concluded that the exception for statements against

51. Note, however, that the confrontation exception grounded in this rationale might be slightly narrower than that endorsed by the hearsay rule. The witness-centered, meaning-based exception for dying declarations would not encompass a declarant who thinks he or she is dying, but who subsequently recovers and thus *could* testify at trial, but is unavailable by virtue of a claim of privilege or other voluntary reasons.

52. 527 U.S. 116 (1999).

53. FED. R. EVID. 804(b)(3).

interest, at least in this particular context, was not a “firmly rooted” exception to the hearsay rule.⁵⁴ This conclusion meant that the reliability of Mark’s statements could not simply be inferred. The Court further concluded that Mark’s statements lacked the particularized “indicia of reliability” required of statements not falling within firmly rooted exceptions.⁵⁵ Accordingly, the statements should have been excluded under the Confrontation Clause.

A witness-centered doctrine would suggest a different approach. First of all, *Lilly* itself would have been an easy case. Mark Lilly was technically “unavailable” to testify only because he had refused to do so. This is the paradigmatic case of statements which would be offensive under a witness-centered view—one brother accusing another and then refusing to confront him at trial. It should not matter, on this view, that Mark had a constitutional right not to testify. The point is not to punish Mark for his refusal, which ideally should have no impact at all on the determination of *his* guilt or innocence. It is simply that a decision not to testify is a decision not to be heard.

The question remains, however, of how an accuser-obligation approach to the confrontation right would treat a so-called statement against interest in a case of true inability to testify. Suppose, for example, that Mark Lilly had died prior to Benjamin’s trial. Would that change the outcome? The answer in that case, it seems to me, would depend upon our view of the circumstances under which the statement was made. When someone makes a full confession to the police, implicating himself but also others, do we view that as an admirable decision to come clean—a decision finally to embody the sort of forthrightness and accountability we respect? Given the assumption that the declarant would have been willing to testify at trial if able, a witness-centered view might see no ignobility in the admission of the prior statement.

Crucially, such a view would depend upon a belief that the declarant was truly coming clean—that he was not behaving strategically. If, for example, a declarant was maneuvering for a deal of some sort, or making a few self-inculpatory statements in order to appear honest and thus lend credibility to his accusatory statements, we might view the case differently. It is worth noting, therefore, that the question of whether a witness was trying to “curry favor” with the police might be as relevant under a witness-centered view as it is under the regnant hearsay-driven doctrine, albeit for different reasons. The hearsay analysis considers statements made in order to curry favor to be unreliable; the accuser-focused approach considers them unworthy of respect.

54. *Lilly*, 527 U.S. at 134.

55. *Id.* at 139.

D. Child Witnesses

No class of out-of-court statements are more controversial—or place more pressure on the current confrontation/hearsay doctrine—than statements made by children who are alleged to have been the victims of abuse by adults. The child's testimony in such a case is obviously critical. At the same time, the consequences of a wrongful conviction are particularly grave. In the typical case, a child has made some sort of statement prior to trial implicating the accused in the alleged abuse. At trial, however, the child is unable to testify fully. The prosecution then seeks to introduce the prior statement. Currently, these cases are resolved through an *ad hoc* stretching and pulling of hearsay doctrine.⁵⁶ An accuser-obligation model might avoid some of this doctrinal uncertainty and produce a more satisfactory and coherent set of results. I say might, rather than would, because the uncertainty will only be eliminated to the extent that the Confrontation Clause is found to mandate exclusion of particular out-of-court statements. Obviously, a statement could be admissible under the Confrontation Clause yet still be barred by the reliability-based concerns informing the hearsay rule.

In a recent article, Friedman has applied his recommended testimonial standard to the question of out-of-court statements by child witnesses.⁵⁷ He comes down in favor of a categorical rule. If the statement was testimonial in nature—meaning that the child could or should have understood that the statement would have punitive consequences—it should be excluded under the Confrontation Clause. The unavailability of the child to testify should, on Friedman's view, be relevant only if it was caused or procured by the wrongful conduct of the accused.⁵⁸ It seems to me, however, that a focus on the rationale behind the testimonial standard might lead to a slightly different conclusion.

Under an accuser-focused approach, the reason we would demand confrontation by those making testimonial statements is not that there is something inherent in the statements themselves that makes us want them to be made in court. Or rather, if there is anything special about the statements themselves, it is their potential or presumed unreliability, which both Friedman and I agree should not be driving confrontation doctrine. An accuser-obligation view of the Con-

56. See, e.g., *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995); *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980); see also *White v. Illinois*, 502 U.S. 346, 355 n.8 (1992) (hearsay exceptions for spontaneous declarations and for statements made for purposes of medical diagnosis are "firmly rooted" for purposes of Confrontation Clause).

57. Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243 (2002).

58. In such circumstances, forfeiture doctrine would open the door to admissibility.

frontation Clause would not focus as much on the nature of the statement per se, as on the circumstances under which the statement was made. If the reason we would require statements made with the knowledge or intent that they would be used against a criminal defendant to be made face to face is that we consider it cowardly and ignoble to make such statements behind someone's back, the pertinent question is whether in this regard we want to hold children to the same standard.

This question would arise in at least three inter-related contexts: as part of the definition of unavailability, in our evaluation of the admissibility of out-of-court statements once we determine a witness to be unavailable, and in our decisions about the way in which child witnesses should be required to testify.

As noted above, a prerequisite to admissibility under an accuser-obligation model of the Confrontation Clause would be the involuntary unavailability or inability of the accuser to testify at trial. In most cases, this would not be difficult to ascertain. Dead people, or those too sick to testify, are unavailable. Those who have fled the jurisdiction, or taken the Fifth, are not, at least for these purposes. The underlying question is whether the person has tried to duck his or her obligation to confront those he or she would accuse. A necessary but not sufficient condition for recognizing an exception to the confrontation obligation under a witness-focused interpretation would be a finding that the witness is not engaged in this form of ignoble avoidance. With child witnesses, the difficult cases on this score do not involve witnesses who are dead, or literally unable to make it to court, but rather those who are too traumatized or frightened to testify face to face. At some level, the traumatized child victim differs only in degree from the adult witness who lacks the courage to confront those he or she would accuse. At the same time, we might not be willing to demand that our children demonstrate the same fortitude we require of our fellow adults.

This same question would arise again once it is determined that a child victim/witness is justifiably and understandably unable to confront a defendant. In many cases, the child will have made prior statements to family members or health care workers or such. Currently, these statements are shoe-horned in under various exceptions to the hearsay rule. The excited utterance exception or the exception for statements made for purposes of medical diagnoses are stretched to cover statements by child witnesses.⁵⁹ With the hearsay tail wagging the confrontation dog, the constitutional analysis depends upon the hearsay determination. An accuser-obligation model would shift the emphasis of our inquiry. Instead of asking whether the circum-

59. See *supra* note 56.

stances under which the statement was made provide assurances of reliability, we would ask whether those circumstances display indicia of ignobility. Does it appear that the declarant was engaged in the sort of avoidance or shadow accusation we aim to eschew? Again, the matter turns on the level of obligation and responsibility we are willing to put on the shoulders of children, rather than on the level of trustworthiness we attach to their statements.

The same inquiry would have implications for the way in which in court testimony is presented. Whether it arises in the context of determining unavailability, or more directly in a decision as to the presentation of evidence at trial, we need to decide exactly *how* child witnesses should be required to give their testimony. As a threshold matter, if a witness is in court to testify, even a witness-centered approach would appear to require that the defendant have an opportunity to cross-examine. Recognizing this is not to equate confrontation with cross-examination directly, as under the current approach. Confrontation remains something we require of witnesses, rather than something we allow defendants. It is simply that one indispensable element of confronting those you accuse would seem to be responding to questions about it. Cross-examination under oath is the way in which we require you to stand behind your accusations. So, generally speaking, either a reliability-based or witness-centered rationale would seem to require cross-examination.

The difficulty, however, lies in fleshing out the cross-examination requirement in this context. For example, many of the most controversial Confrontation Clause cases have involved the giving of testimony by child witnesses, and in particular by child victims. In *Coy v. Iowa*, the question was whether two children—the victims of sexual assault—could testify from behind a screen.⁶⁰ In *Maryland v. Craig*, the issue was whether child witnesses could testify via closed-circuit television.⁶¹ In both cases, an accuracy-based rationale seemed to point in favor of allowing the alternative method of testimony. It seemed to Justice Scalia, however, that such an approach robbed the term “confront” of any real meaning. The result, as we know, is a set of unsatisfactorily divided opinions in which testifying from behind a screen is considered unconstitutional while testifying via closed-circuit television is held not to violate the defendant’s right to confrontation.

Again, a witness-centered approach would call for a different analysis. The question would not be whether the method in question insured the accuracy of the evidence. Nor, however, would the analysis turn on a formal definition of the term “confront.” Instead, the ques-

60. 487 U.S. 1012 (1988).

61. 497 U.S. 836 (1990).

tion would be reconnected to the inquiry used to determine unavailability, and to determine the admissibility of out-of-court statements. Should we require of children the same sort of confrontation we require from adults? Should we demand that child witnesses be willing literally to “look him in the eye”?

Our answers to these questions might well depend on the circumstances. The age of the witness might make a difference, as would the degree of harm we feel the witness might suffer by being forced to endure face to face confrontation. To what extent are children of various ages capable of understanding the implications of their statements? To what extent do we want to force them to confront those implications? At the very least, it seems clear that an accuser-obligation approach would allow us to devise alternative methods of hearing the testimony of at least some young children without, as Justice Scalia seems to fear, carving the heart out of the confrontation right.

The law is not without experience in dealing with versions of this inquiry. In thinking about how to deal with child witnesses, therefore, we might look to other arenas in which we must decide how much adult-like responsibility to place on children of various ages. At one extreme, in voting, military service, and a range of other contexts, children under the age of majority are not considered fully capable of shouldering adult responsibility. This view would suggest that children be relieved of the obligation to confront under at least some circumstances. It seems abundantly clear, however, that we would not want to embrace a general rule that minors are not required to confront.

At the other extreme, we might take the view that testifying is such an important and adult activity that whoever engages in it should be held to adult standards of responsibility. This would be to adopt something like a tort negligence model. Children are generally required to take only that level of care appropriate to children of that age.⁶² Where children are performing potentially dangerous activities generally engaged in by adults, however, tort law requires children to live up to an adult standard of care.⁶³ When a teenager engages in adult activities—riding a motorcycle, or driving a powerboat, for example—he will be required to observe an adult level of care.⁶⁴ On this

62. According to the *Restatement (Third) of Torts*, for example, “[w]hen the actor is a child, the actor’s conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience.” *RESTATEMENT (THIRD) OF TORTS* § 10 (Tentative Draft No. 1, 2001).

63. “If a child is a defendant or was engaged in an activity that posed a significant danger to others, which those others were not able without significant burden to discover and avoid, the child’s conduct should be measured against that of the reasonably careful person.” *Id.* § 10 cmt. f.

64. See, e.g., *Harrelson v. Whitehead*, 365 S.W.2d 868 (Ark. 1963) (holding fifteen-year-old to adult standard in operation of a motorcycle); *Dellwo v. Pearson*, 107

model, we might require child witnesses of even very young ages to confront those they would accuse on the theory that the accusing of a criminal defendant is certainly as dangerous and adult an activity as operating a motor vehicle. However, it is not clear that the logic of the tort rule is applicable in the very different context of a young child victim/witness.

We hold youthful tortfeasors liable under an adult standard for adult activities under two related rationales. First, the other people they encounter—other drivers, for example—may be relying on them to live to up a generally applicable standard. People on the road have a right to expect all other drivers to meet the same standard. This rationale begs the question in the context of child witnesses, where we are trying to figure out exactly what we have a right to expect from a particular witness. More to the point, a young person who chooses to engage in an adult activity has effectively held himself or herself out as ready for adult-like responsibility. This is a quasi-estoppel rationale. Put differently, we would be perfectly happy if sixteen-year-olds never got behind the wheel of a car. If they choose to do so, therefore, we understand it to be for their own benefit, and demand that they bear the risk that they might not truly be ready. The same can not be said of child witnesses. A ten-year-old rape victim has not chosen for his or her own purposes to engage in the adult-like activity of accusation.

Some more nuanced standard is clearly needed. It makes one wish that there were a civil equivalent of a Bar Mitzvah—a way of marking the time when a child, though perhaps not ready to engage in every adult activity, is nonetheless no longer able to take advantage of the child's freedom from moral and social responsibility. Unfortunately for those seeking an easy-to-apply doctrine, no such clear social marker is available. It seems clear that at least some young children should be relieved from the confrontation obligation. The question is how young.⁶⁵ The key, it seems to me, is recognizing that there are two separate questions to be asked regarding child witnesses: one about competence and one about reliability. We have to decide not only when a child is old enough to be relied upon, but also when he or she has reached what we might call the "age of confrontation." Hearsay analysis focuses on how far the child can be trusted; confrontation analysis on how far the child ought to be obliged.

These questions may not be easy, but at least they are the right questions. As a result, an accuser-obligation model of confrontation

N.W.2d 859 (Minn. 1961) (holding twelve-year-old to adult standard in operation of a speed boat).

65. Having referred to the line drawn by tort law, it may be worth noting that the *Restatement (Third) of Torts* takes the position that a child under the age of five is incapable of negligence. RESTATEMENT (THIRD) OF TORTS § 10.

does not provide a simple solution to the difficult problems presented by child witnesses. It does, however, at least provide a coherent way of addressing these problems.

V. CONCLUSION

A range of additional doctrinal implications would need to be worked out in light of a shift to an accuser-obligation model of Confrontation Clause analysis. For example, what if the defendant, rather than the witness, is under age? Should the Confrontation Clause apply in juvenile adjudications? A witness-focused approach would suggest yes. If we require confrontation largely out of a desire not to abet sneaking or back-stabbing accusation, it should hardly ease our concern to know that the person who has been stabbed in the back is a child. This approach would accord with caselaw holding that the confrontation right does hold in juvenile adjudications.⁶⁶ But what about corporate defendants? On one hand, if the status of the defendant is not critical, perhaps the right should attach; on the other hand, this may be a case where the status of the defendant *does* matter, not for its own sake, but because of what it means about the witness's behavior. We may consider it ignoble and cowardly to stab a person in the back, whether that person is a child or an adult, but do cases involving imaginary persons merit the same dignitary concerns?⁶⁷

My goal is obviously not to answer all of these difficult questions in this brief Essay, but rather to sketch out a basis on which we might begin to address them. In particular, I have tried to outline a rationale which meets several different requirements. First, and most crucially, an accuser-obligation model is consistent with both the history and language of the Confrontation Clause. Second, this approach grounds this constitutional right on its own foundation, and frees it from its current status as an appendage to the rule against hearsay. Third, this approach provides an appealing and coherent rationale for the application of the Confrontation Clause to future cases. Finally, because the roots of an accuser-obligation model are already present in current caselaw, this approach would allow for a reinterpretation, rather than repudiation, of much current doctrine. This means that Confrontation Clause law would not need to go through a sudden radi-

66. See *In re Gault*, 387 U.S. 1, 56-58 (1967).

67. While there is currently no exception to the Confrontation Clause for corporate defendants, most key witnesses in corporate criminal cases are or were agents of or co-conspirators with the defendants, thus rendering it unnecessary under current doctrine for the courts to focus on the question of how the confrontation right ought to apply. See Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793, 876-81 (1996).

cal change, but could be overhauled under sail, as it were, a bit at a time, in a way conducive to a thoughtful and gradual elaboration of a witness-focused approach.

From an academic perspective, there is an additional benefit to recognizing and attempting to articulate an accuser-obligation model of the Confrontation Clause. It highlights and illustrates one way in which community identity may be reflected and constituted through law. In *Hamlet*, when the Players come to Elsinore, Polonius tells Hamlet that he “will use them according to their desert.” Hamlet replies that they should be treated “. . . much better! Use every man according to his desert, and who shall scape whipping? Use them after your own honor and dignity.”⁶⁸ My larger point in this Essay is that we can learn something about ourselves, and in particular about our own particular conceptions of such things as “honor” and “dignity” by looking at how we aspire to treat those over whom we exercise power through our criminal justice system. At the same time, we can perhaps make more sense of our particular and sometimes puzzling system of criminal procedure by seeing it as in part a manifestation of our sense of what kind of people we want to understand ourselves to be.

68. WILLIAM SHAKESPEARE, *HAMLET*, act 2, sc. 2.